CIMB SECURITIES SDN BHD

v.

LEE LAI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
STEVE SHIM J
[CIVIL SUIT NO: D5-22-782-1998]
3 NOVEMBER 1999

CIVIL PROCEDURE: *Summary judgment - Affidavit - Whether supporting affidavit needs to be served conjointly - Order 14 r. 2(3) Rules of the High Court 1980 - Whether breach of O. 14 r. 2(3) a curable irregularity - Whether any prejudice suffered*

Immediately after filing its summons-in-chambers ('SIC') and supporting affidavit, the plaintiff's solicitors served both documents on the solicitors for the defendants. Subsequently, the plaintiff's solicitors served the sealed copy of the SIC without its supporting affidavit on the defendants' solicitors. On the hearing day of the SIC, counsel for the defendants raised the preliminary objection that there was a breach of O. 14 r. 2(3) Rules of the High Court 1980 ('RHC') since the plaintiff's solicitors failed to serve on the defendants' solicitors the sealed copy of the SIC together with its supporting affidavit. It was submitted therefore that the SIC was a nullity. The senior assistant registrar upheld the preliminary objection and dismissed the plaintiff's application for summary judgment. Hence the instant appeal.

Held:

[1] As it was not expressly stated in O. 14 r. 2(3) RHC that the SIC and the supporting affidavit had to be served conjointly, there was no absolute obligation on the part of the plaintiff to serve the documents conjointly on the defendants.

[2] Since the plaintiff's solicitors had served the sealed SIC and its supporting affidavit on the defendants' solicitors, although not conjointly, but certainly not less than four clear days before the return day and as the supporting affidavit was served within 14 days from the date of the filing of the unsealed summons, there could not have been any breach of O. 14 r. 2(3) or O. 32 r. 13(2)(a) of the RHC.

[3] In the event that there was a breach of O. 14 r. 2(3) and/or O. 32 r. 13(2) Rules of the High Court 1980, such breach would be a mere irregularity curable under O. 2 r. 1. This was because the defendants had suffered no prejudice as a result of the alleged breach.

[Appeal allowed.]

Case(s) referred to:
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 3 CLJ 321 ***(foll)***
Sarawak Electricity Supply Corp v. MS Shiping Sdn Bhd [1998] 1 CLJ Supp 58 ***(foll)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1, O. 14 r. 2(3), O. 32 r. 13(2)(a)

For the plaintiff - SL Goh; M/s Shook Lin & Bok
For the 1st respondent - Cik Azrina; M/s V Pury & Bala
For the 2nd respondent - KL Chiew; M/s Chew & Lim

Reported by Izzaty Izzuddin

JUDGMENT

Steve Shim J:

There are two appeals before me. Both appeals are by the same plaintiff against the decisions of the learned senior assistant registrar dismissing the O. 14 applications for summary judgment taken out by the plaintiff against different defendants. As the factual background, circumstances and issues of the appeals are similar, it has been agreed by the parties involved that the outcome of one should also bind the other. On that note, I have decided to proceed with suit no. 22-782-98.

At the outset, counsel for the 2nd defendant has raised a preliminary objection, contending, in effect, that the sealed copy of the summons-in-chambers ("the said summons") was served on the defendants' solicitors without any affidavit-in-support and therefore the said summons was a nullity. For a proper perspective of the objection, it is, I think, necessary to note the relevant factual sequence of events which are conveniently set out by the plaintiff's counsel as follows:

16.12.1998:	Summons-in-chambers (encl. 14) filed with affidavit-in-support of Krishnan a/l Kandasamy affirmed on 16.12.1998. Advance copies of summons-in-chambers and affidavit served on solicitors for the Defendants; Mesrs Chew & Lim and Messrs V Pury & Bala.
22.12.1998:	Sealed summons-in-chambers served on solicitors for the Defendants, Messrs Chew & Lim and Messrs V Pury & Bala.
28.12.1998:	2nd Defendant's affidavit-in-reply dated 24.12.1998 served.
11.1.1999:	Plaintiff's affidavit-in-reply to 2nd Defendant's affidavit filed and served.

26.1.1999: The 1st Defendant filed and served its affidavit-in-reply.

12.2.1999: Plaintiff's affidavit-in-reply filed and served.

18.5.1999: 1st Defendant's corrective affidavit filed and served.

Quite clearly, the complaint by the 2nd defendant is that when the plaintiff's solicitors served the sealed copy of the said summons on his solicitors on 22 December 1998, there was no affidavit accompanying it and hence there had been a breach of the Rules of the High Court. In expanding on this, counsel for the 2nd defendant has submitted that the service of the sealed summons alone (without the accompanying supporting affidavit) on 22 December 1998 was defective for breach of O. 14 r. 2(3) RHC which stipulates:

> (3) The summons, a copy of the affidavit-in-support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.

For the plaintiff, it has been contended that particular emphasis should be placed on the words "served on the defendant not less than four clear days before the return day." Counsel for the plaintiff submits that what is more significant under the above sub-r. (3) is whether service of the documents expressly referred therein must be made not less than four clear days before the return day and not whether those documents should be served conjointly. According to him, the documents expressly referred therein need not be served conjointly so long as they are served on the defendants and/or their solicitors not less than four clear days before the return day. I think that is a fair and proper construction to take. There is nothing expressly stated in O. 14 r. 2(3) that the summons and the supporting affidavit have to be served conjointly nor can any such implication arise therefrom. In my view, there is no absolute obligation on the part of the plaintiff and/or his solicitors to serve such documents conjointly on the defendants and/or their solicitors although of course ideally this should be done. Indeed, in almost every case, such documents have been served conjointly as a matter of course.

In the instant case, it is not disputed that the plaintiff's solicitors had served the unsealed summons together with the affidavit-in-support on the defendant's solicitors on 16 December 1998. As such, it is the plaintiff's position that the requirement for service of those documents not less than four clear days before the return day has been complied with. It is also the plaintiff's stand that the requirement for the affidavit-in-support to be served on the defendant's solicitors within 14 days from the date of the filing of the application (summons) under O. 32 r. 13(2)(a) RHC has been

fulfilled since, as already indicated, both the summons (unsealed) and the affidavit-in-support were served conjointly on the defendant's solicitors on 16 December 1998. However, the defendants have taken the position that as the said summons served on 16 December 1998 was unsealed, the affidavit-in-support could have no legal effect, relying, quite obviously, on the authority of *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 3 CLJ 321; [1996] 3 AMR 2869, in particular to that part of the judgment of Siti Norma Yaakob, JCA which states:

> ... the purpose of serving the unsealed copy of the summons and the affidavit-in-support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It cannot do anything more than this as the unsealed copy of the summons has yet to get the official stamp of the court to clothe it with the authority that it has been issued pursuant to Order 32 r.2(l) of the RHC. *The affidavit-in-support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it.*

I accept that the parts underscored above are particularly significant in the context of this case. Applying them to the factual situation herein, I think it is fair to say that as the said summons filed on 16 December 1998 was subsequently sealed on 22 December 1998, this would have the effect of clothing the affidavit filed on 16 December 1998 with legal effect. And since the said affidavit had been served on the defendants' solicitors within 14 days of the date of filing the summons (though unsealed), I am of the clear view that O. 32 r. 13(2)(a) RHC has been fully complied with. Here, I would take the same stand as I did in *Sarawak Electricity Supply Corp v. MS Shipping Sdn Bhd* [1998] 1 CLJ Supp 58; [1998] 2 MLJ 83 when adopting the legal position propounded by the Court of Appeal in *Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 CLJ 300; [1997] 1 MLJ 581 wherein Mahadev Shanker said *inter alia*:

> The object of O. 32 r. 13(2) wasset out by Richard Tallala J in *PB Securities Sdn Bhd v. Abdul Rashid bin Mohamed* [1994] 3 MLJ 168 at p. 174 ...
>
> However, we would like to add that the critical words in O. 32 r. 13(2)(a) – for the purposes of computation of time – are 'within 14 days from the date **of the filing** of the application and in O. 32 r. 13(2)(b) within 14 days from the date of service.'
>
> Accordingly, time is to run not from the date on which the application is sealed but the date on which the application is filed. Consequently, we are unable to agree with the part of the judgement below and in the case of *Pua Lai Ong* earlier referred to. The object of the exercise there is to give the adverse party notice as soon as possible without reference to the eventual date when the

application would be sealed in the registry. By the time that event took place it was envisaged that the affidavit-in-support of the application would already be in place and the registry would therefore be in a better position to allot the return date on which the application should be heard.

In the light of the position I take, I am therefore driven to the conclusion that as the plaintiff's solicitors had served the sealed summons and the supporting affidavit on the defendants' solicitors, though not conjointly, but certainly not less than four clear days before the return day and as the said supporting affidavit was served within 14 days from the date of the filing of the summons (though unsealed), there could not have been any breach of O. 14 r. 2(3) or O. 32 r. 13(2)(a) RHC. In the premises, I am unable to agree with defendants' counsel's contention that the sealed summons subsequently served on the defendants' solicitors without the accompanying affidavit is a nullity.

This leaves us with what appears to be an alternative proposition raised by counsel for the plaintiff, namely, that in the event there was a breach of O. 14 r. 2(3) and/or O. 32 r. 13(2) RHC, such a breach is an irregularity curable under O. 2 r. 1 RHC because the defendants had suffered no prejudice as a result of the alleged breach. I think there is substance in that proposition. Here, the defendants had in fact filed their respective affidavits-in-reply. There is nothing to indicate or suggest that the defendants had been or could have been prejudiced in any way by the alleged irregularity.

In the circumstances and for the reasons stated, I hold that the defendants' objection is unsustainable. In my view, the decision of the learned senior assistant registrar in dismissing the plaintiff's application on the basis of the preliminary objection raised by the defendants is clearly misconceived. It is in that context that I will allow this appeal with cost. As agreed by the parties, this decision also binds the parties in the appeal in **Suit No. 22-972-98** herein. That being the case, that appeal is also allowed with cost.